REPLY BRIEF

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Several months after the decision of the Third Circuit below, this Court rendered its opinion in *Fisher v. United States*, 44 U. S. L. W. 4514 (April 21, 1976). In a lengthy analysis this Court ruled, for the first time, that the *act* of producing documents in response to a subpoena *duces tecum* may be sufficiently "testimonial", and therefore privileged, particularly when that act *authenticates* the existence of the records or their preparation by the person commanded to produce them.

Neither of the parties and neither of the courts below focused on the issue of whether Mr. Freedman's *act* of producing the subpoenaed records is privileged, primarily because this issue, as framed by *Fisher*, was not relevant at the time. Since Mr. Freedman's firm is a sole proprietorship and since he has continually urged that he alone has exclusive access to and control over the records (F. F. 32, 71), there is a strong possibility that Mr. Freedman may be forced to incriminate himself by the act of producing records in response to the instant subpoena. Thus, in light of *Fisher*, we respectfully urge that the proper approach for this Court would be to grant the pending petition and to remand to the District Court for further proceedings on the issue of the incriminatory incidents of the *act* of producing the subpoenaed records.

The government apparently concedes that *Fisher* has introduced a new legal issue that requires further proceedings before the District Court. At footnote 4 of its brief, the government recognizes that had Mr. Freedman demonstrated that his act of producing his business records would incriminate him, then he might have been able to avail himself of his Fifth Amendment privilege. However, the government urges that *Fisher* requires a denial of this petition because Mr. Freedman did not demonstrate that "he personally prepared any of the financial records of the firm or that the subpoena would require him to 'restate, repeat or affirm the truth of the contents of the documents

sought' " (Gov. Br. fn. 4, quoting *Fisher*, sl. op. 17). The government is correct, but fails to recognize that until *Fisher* Mr. Freedman never had reason to make such demonstrations. He now should be given that opportunity since the relevant legal framework has changed during the time this petition has been pending.

Apart from *Fisher*, nothing the government has said in its brief alters the fact that the Third Circuit has completely misconstrued the law as it existed prior to *Fisher*. For all of its discussion of *Bellis v. United States*, 417 U. S. 85, the government does not and cannot deny the fact that *Bellis* explicitly mandates that the Fifth Amendment privilege be sustained when asserted by an individual who has exclusive "rights of access and control" over business records. *Id.* at 92-93. In the present case it is established by findings of fact of the District Court (F. F. 32, 71) that only Mr. Freedman has such access and control.

The government grudgingly concedes that the question of "access" to the records "may be relevant" to a claim of privilege (Gov. Br. 6), but, echoing the Third Circuit, claims without any supporting authority that the "nature" of the records is "the more important factor" (Gov. Br. 6). Since the records in question here relate to a relatively large business enterprise, the government's position, as well as that of the Third Circuit, is that such records, by their "nature", never can be privileged under the Fifth Amendment.

The fundamental problem with the analysis of the government and the Third Circuit is that, as yet, no court, including this Court, has held that business records *per se* are beyond the scope of the Fifth Amendment. In fact, this Court held to the contrary in *Bellis, supra* at 87-88, when it said that records of a sole proprietor may be privileged, and that principle was preserved in *Fisher, supra* at 4520, to the extent "(c)ompliance with a subpoena tacitly concedes the existence of the papers de-

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manded and their possession or control by" the person subpoenaed. Until this Court explicitly rejects *Bellis* and adopts the reasoning of the Third Circuit, the test of *Bellis*, which includes the criterion of "access and control", is still the law, the Third Circuit to the contrary notwithstanding.

In an attempt to circumvent the undisputed finding of the District Court that Mr. Freedman and only Mr. Freedman has access to and control over the subpoenaed records (F. F. 32, 71), the government distorts certain facts in the record and simply makes up others. Thus, the government begins its brief by characterizing Freedman, Borowsky and Lorry as a "partnership" and Mr. Freedman as a "partner". Presumably the government is attempting to equate this case with *Bellis*, which involved a law *partnership* formed under a Pennsylvania statute. However, the District Court expressly refused to find that Freedman, Borowsky and Lorry was a "partnership" and instead set forth an extensive series of findings consistent with the fact that Mr. Freedman's firm actually is a large, successful sole proprietorship. Because it is, his firm's business records belong to him, and production may incriminate him, as much as any other of his personal records.

After the first two pages of its brief, the government silently abandons the use of the word "partnership" and instead adopts an even stranger approach. On pages 7 and 8 of its brief, it tells the Court, *without any citations to the record* that Mr. Freedman's testimony about his exclusive right of access to his business records may have been "inaccurate" because certain attorneys in his firm have since left and "took firm records with them." With all deference, the government is misleading this Court by reaching beyond the record to tell a story that happens to be untrue. The attorneys who left Mr. Freedman's firm took with them only the files of certain cases they were servicing. In papers since filed with the District Court,

Mr. Freedman has stated that these attorneys have possession of the case files with his permission and only to continue servicing the clients. But, most important, *none of the business records covered by the instant subpoena were removed by anyone. Those records* have remained, as always, in Mr. Freedman's exclusive access and control.

In conclusion, the government distorts the holding of *Bellis*, as well as the record, in an attempt to convince this Court to deny Mr. Freedman's petition. Moreover, the government would apply *Fisher* against Mr. Freedman without affording him *any* opportunity to demonstrate that the *act* producing the subpoenaed records might incriminate him. However, by denying this petition, the law in the Third Circuit, unlike the law in any other Circuit, henceforth will be that *all* business records are beyond the scope of the Fifth Amendment privilege. Contrary to *Fisher*, such a result would be compelled regardless of whether the act of authenticating such records would be incriminatory. We respectfully contend that this radical principle should not become the law anywhere without further guidance from this Court.

Respectfully submitted,

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